(1)
Supreme Court, U.S.
FILED
98 505 SEP 24 1998
OFFICE OF THE CLERK

No. _____

In The

# Supreme Court of the United States

October Term, 1997

EDWARD H. MATHEWS,

*Petitioner,*

v.

SEARS PENSION PLAN and
SEARS ROEBUCK & COMPANY,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

PAUL E. SLATER
*Counsel of Record*
BRUCE S. SPERLING
ROBERT D. CHEIFETZ
SPERLING, SLATER & SPITZ, P.C.
55 West Monroe Street
Suite 3300
Chicago, Illinois 60603
312/641-3200
*Counsel for Petitioner*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

56pp

## QUESTIONS PRESENTED

Ed Mathews represents a class of Sears retirees who elected to receive lump sum distributions under the Sears Pension Plan ("Plan"), which is qualified under ERISA. Sears present-valued these lump sum distributions by using a discount rate that is referred to in summary plan descriptions ("SPD"). The Plan, however, specified a different discount rate. In Mr. Mathews' case, the use of the SPD discount rate, rather than the Plan discount rate, reduced his lump sum distribution by $17,324.96. Mr. Mathews brought this class action to obtain the immediate and unconditional payment of the monies owed him and others pursuant to the Plan. The Questions Presented are:

1. When an ERISA plan unambiguously specifies the discount rate to be used in present-valuing lump sum distributions to retiring employees, and an SPD refers to a different rate, does an employer violate ERISA when it reduces the payments to the retirees by using the SPD rate rather than the rate specified in the plan itself?

2. Is a retiree who seeks the immediate and unconditional payment of money damages for breach of the provisions of an ERISA plan entitled to a jury trial under the Seventh Amendment to the United States Constitution?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

OPINION BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

I. Background Facts ..... 2

A. In Present-Valuing Lump Sum Retirement Distributions, Sears Used The Discount Rate Referred To In Summary Plan Descriptions Rather Than The Discount Rate Specified In The Plan ..... 2

B. The District Court Proceedings ..... 4

C. The Seventh Circuit Proceedings ..... 5

1. Although the Seventh Circuit found that "the language of the Sears Plan . . . is unambiguous in favor of the class," the court nonetheless held that Sears' use of the January 1 rate set forth in the SPD did not violate ERISA ..... 5

2. The Seventh Circuit, *sua sponte* and without analysis, ruled that Mr. Mathews had no right to a jury trial of his ERISA breach of contract claim .... 6

REASONS FOR GRANTING THE WRIT ..... 7

TABLE OF CONTENTS – Continued

Page

I. The Seventh Circuit's Ruling Further Extends Circuit Court Conflict And Confusion Regarding The Treatment Of ERISA Claims Made Pursuant To The Terms Of An ERISA Plan When The Plan And SPD Conflict ..... 7

A. The circuit courts do not agree under what circumstances the plan or the SPD will control in the event their terms conflict ..... 8

B. The Seventh Circuit's opinion in *Mathews* adds to the confusion, and conflicts with the opinions of other circuit courts..... 10

II. The Seventh Circuit's Holding That An ERISA Plaintiff Is Never Entitled To A Jury Trial Conflicts With This Court's Seventh Amendment Rulings..... 12

A. The Tenth Circuit has described the nature of the issue here as a breach of contract.. 13

B. This Court has repeatedly held that claims for monetary relief are legal ..... 15

CONCLUSION ..... 17

## TABLE OF AUTHORITIES

Page

CASES

*Adams v. Cyprus Amax Minerals Company*, 149 F.3d 1156 (10th Cir. 1998) ..... 13, 14, 16

*Bower v. Bunker Hill Co.*, 114 F.R.D. 587 (E.D. Wash. 1986) ..... 16

*Blue Cross & Blue Shield of Alabama v. Sanders*, 138 F.3d 1347 (11th Cir. 1998) ..... 14

*Chiles v. Ceridian*, 95 F.3d 1505 (10th Cir. 1996) ..... 9

*Cinelli v. Security Pacific Corp.*, 61 F.3d 1437 (9th Cir. 1995) ..... 10

*Curtis-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995) ..... 12

*Edwards v. State Farm Mutual Insurance Co.*, 851 F.2d 134 (6th Cir. 1988) ..... 8

*Fallo v. Piccadilly Cafeterias, Inc.*, 141 F.3d 580 (5th Cir. 1998) ..... 9

*Feltner v. Columbia Pictures Television, Inc.*, ___ U.S. ___, 118 S. Ct. 1279 (1998) ..... 15

*Glocker v. W.R. Grace & Co.*, 974 F.2d 540 (4th Cir. 1992) ..... 8, 12

*Govoni v. Bricklayers, Masons & Plasterers*, 732 F.2d 250 (1st Cir. 1984) ..... 8

*Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) ..... 13

*Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310 (3rd Cir.), *cert. denied*, 501 U.S. 1232 (1991) ..... 8

*Health Cost Controls v. Isbell*, 139 F.3d 1070 (6th Cir. 1997) ..... 10

TABLE OF AUTHORITIES – Continued

Page

*Heidgerd v. Olin Corp.*, 906 F.2d 903 (2d Cir. 1990) ..... 8

*Hightshue v. AIG Life Insurance Co.*, 135 F.3d 1144 (7th Cir. 1998) ..... 9

*Hulcher v. United Behavioral Systems, Inc.*, 919 F.Supp. 879 (E.D. Va. 1995) ..... 16

*Marolt v. Alliant Techsystems, Inc.*, 146 F.3d 617 (8th Cir. 1998) ..... 9

*Martin v. Blue Cross/Blue Shield of Va., Inc.*, 115 F.3d 1201 (4th Cir.), *cert. denied*, ___ U.S. ___, 118 S. Ct. 629 (1997) ..... 9

*McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192 (10th Cir. 1992) ..... 8, 12

*McKnight v. Southern Life And Health Insurance Co.*, 758 F.2d 1566 (11th Cir. 1985) ..... 8

*Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) ..... 15

*Pratt v. Petroleum Product Management Employee Savings Plan*, 920 F.2d 651 (10th Cir. 1990) ..... 11, 14, 16

*Schadler v. Anthem Life Insurance Co.*, 147 F.3d 388 (5th Cir. 1998) ..... 9

*Spacek v. Maritime Association*, 134 F.3d 283 (5th Cir. 1998) ..... 11

*Sturges v. Hy-Vee Employee Benefit Plan and Trust*, 991 F.2d 479 (8th Cir. 1993) ..... 8, 12

*Teamsters Local No. 391 v. Terry*, 494 U.S. 558 (1990) ..... 13, 15, 16

*Tull v. United States*, 481 U.S. 412 (1987) ..... 13, 15

*Vaughn v. Olsen Steel Co., Inc.*, 871 F.Supp. 247 (D.S.C. 1994) ..... 14

## TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. am. VII ..... 13

28 U.S.C. § 1254(1) ..... 1

28 U.S.C. § 1291 ..... 4

28 U.S.C. § 1331 ..... 4

29 U.S.C. § 1022 ..... 2, 12

29 U.S.C. § 1102 ..... 2, 12

29 U.S.C. § 1132 ..... 2, 4, 14, 15, 16

MISCELLANEOUS

Restatement (Second) of Trusts §§ 197-198 (1959) .... 16

George Lee Flint, Jr., *ERISA: Jury Trial Mandated for Benefit Claims Actions*, 25 Loy. L.A.L.Rev. 361 (1992) ..... 16

## PETITION FOR WRIT OF CERTIORARI

Mr. Mathews respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in order to: (1) resolve circuit court conflict and confusion regarding the rights of a participant in an ERISA plan, when the terms of the plan and SPD differ; and (2) resolve a conflict between the Seventh Circuit decision and relevant decisions of this Court regarding a plaintiff's Seventh Amendment right to a jury trial when monetary relief is sought.

## OPINIONS BELOW

The Seventh Circuit opinion, 144 F.3d 461, is reprinted in the Appendix ("App.") at App. 1. The memorandum opinion and order of the district court, 1997 U.S. Dist. LEXIS 9892 (N.D.Ill. July 7, 1997), is reprinted at App. 17.

## JURISDICTION

The Seventh Circuit entered judgment on May 13, 1998, and entered an order denying rehearing and suggestion for rehearing *en banc* on June 26, 1998 (App. 27). This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Seventh Amendment to the United States Constitution, and the applicable provisions of the Employee Retirement Income Security Act of 1974 (ERISA) – 29 U.S.C. §§ 1102, 1022, 1132 – are reprinted in the Appendix (App. 31).

## STATEMENT OF THE CASE

### I. Background Facts

#### A. In Present-Valuing Lump Sum Retirement Distributions, Sears Used The Discount Rate Referred To In Summary Plan Descriptions Rather Than The Discount Rate Specified In The Plan.

The Sears Pension Plan is qualified under ERISA. It allows retirees to choose a lump sum distribution instead of an annuity. (App. 1). In order to compute the lump sum it is necessary to discount the annuity payments to present value by use of an interest rate. (App. 1-2). A higher discount rate results in a lower lump sum payment. (App. 2).

The Pension Benefit Guaranty Corp. ("PBGC") publishes a discount rate monthly. *Id.* The Plan states it will present-value lump sum distributions by using the PBGC rate in effect "as of the date of distribution." *Id.* The "date of distribution" is the first day of the month immediately following retirement. *Id.* For example, Mr.

Mathews retired on May 15, 1991, so his date of distribution was June 1, 1991. *Id.*

Sears, however, did not use the PBGC rate in effect as of the first day of the month immediately following retirement to calculate lump sums. *Id.* Instead, it used the PBGC rate in effect on January 1 to compute all lump sums distributed during that year. *Id.* While contrary to the Plan language, the January 1 rate is referred to in the summary plan description ("SPD") that Sears made available to its employees. (App. 4). These summary documents, however, specifically state that the Plan, not the SPD, is the controlling document:

> Although this booklet highlights the main provisions of the Pension Plan, it is not a legal document. Complete details of the Plan can be found in the official Plan Document, which is the controlling instrument of the Plan in all cases.

App. 29-30 (Exhibit Z to Plaintiff's Supplemental Appendix to Motion for Summary Judgment).

The harm inflicted on Mr. Mathews and the class he represents by the use of the January 1 rate rather than the rate in effect on the date of distribution is easily shown. If the PBGC rate in effect on January 1 was higher than the rate in effect on the retiree's date of distribution, the retiree received a lower lump sum. (App. 2). Mr. Mathews' lump sum distribution was thus reduced by $17,324. *Id.* All class members similarly suffered a reduction in their lump sum distributions. *Id.*

At the end of 1994, in response to complaints from Sears' employees, Sears amended the Plan to make it consistent with the SPD. The Plan, like the SPD, now

provides for the use of the PBGC rate in effect on January 1. (App. 4; R76, ¶24).

**B. The District Court Proceedings.**

In early 1995, Mr. Mathews brought suit to obtain the immediate and unconditional payment of the monies owed to him and the class under the terms of the Plan. (App. 17). Mr. Mathews also requested injunctive relief regarding the calculation and payment of future lump sum distributions, but Sears' 1994 amendment mooted this request. Mr. Mathews timely filed a jury demand on all matters triable as of right by a jury. The district court had jurisdiction pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1132 of ERISA.

The district court certified a class consisting of all the Sears retirees who would have received larger lump sums if Sears had used the PBGC discount rate in effect as of the date of their distribution (the Plan rate), rather than the January 1 rate (the SPD rate). (App. 2, 17). Sears never moved to strike Mr. Mathews' jury demand. The parties cross-moved for summary judgment. The district court granted summary judgment for defendants, finding that Sears' use of the SPD discount rate did not violate the Plan. (App. 26). The Seventh Circuit had jurisdiction over Mr. Mathews' appeal pursuant to 28 U.S.C. § 1291.

### C. The Seventh Circuit Proceedings.

#### 1. Although the Seventh Circuit found that "the language of the Sears Plan . . . is unambiguous in favor of the class," the court nonetheless held that Sears' use of the January 1 rate set forth in the SPD did not violate ERISA.

The Seventh Circuit acknowledged that Sears did not "follow[ ] the literal language of the plan" and that the use of the January 1 rate was "discrepant with [the plan] language." (App. 3). Indeed, the Seventh Circuit stated that interpreting the phrase "as of the date of the distribution" to mean the first day of the year seems to be "a bold, or even an outrageous, interpretation of the phrase." (App. 4).

The Seventh Circuit further held that the Plan language, on its face, is "unambiguous in favor of the class." (App. 7). Nevertheless, the appellate court affirmed summary judgment for Sears on two grounds.

First, purporting to apply the "extrinsic ambiguity doctrine," the Seventh Circuit held that the facially clear Plan language "as of the date of distribution" was really ambiguous, and might mean "the January 1 rate." (App. 12). To find this ambiguity, the Seventh Circuit relied upon three pieces of extrinsic evidence: (1) a Treasury Department regulation that had interpreted a statute (with similar "date of distribution" language to that found in the Plan) to permit the use of the PBGC rate as of either the date of distribution or the first day of the plan year; (2) the "course of dealing" between the class and Sears; and (3) the fact that the January 1 rate was set

forth in the SPD. (App. 12). On this basis, the Seventh Circuit held the unambiguous Plan language to be ambiguous. For reasons explained below, the court then held that the Plan did not mean what it appeared to say. (App. 13).

Second, rejecting what the Seventh Circuit termed "another string to [Mr. Mathews'] bow," the court held that the Plan language need not be enforced in any event, because there was no evidence that any class member had relied on it. (App. 14). This followed, wrote the court, because strict adherence to the Plan language would result in a "windfall" to Mr. Mathews. (App. 15). This was true, reasoned the court, because Sears' use of the January 1 rate purportedly resulted in higher lump sum distributions to different Sears retirees (who are not members of the class) and Sears could not require those retirees to return those additional monies. *Id.*

### 2. The Seventh Circuit, *sua sponte* and without analysis, ruled that Mr. Mathews had no right to a jury trial of his ERISA breach of contract claim

Having determined to look outside the Plan to interpret the meaning of the Plan's admittedly clear and unambiguous language, the Seventh Circuit held that "the finder of ultimate facts" must weigh the three pieces of extrinsic evidence referenced above against the clear Plan language (and presumably any extrinsic evidence favorable to plaintiff). (App. 12). The Seventh Circuit acknowledged that this would normally be a fact-finding function for the jury. (App. 12-13). However, the court

held, *sua sponte*, that an ERISA plaintiff is never entitled to a jury trial and that the trial court would, therefore, sit as the finder of fact. (App. 13).

The court further held that remand for a bench trial was unnecessary because (the appellate court assumed) all the evidence was before the trial court on summary judgment, making it "an empty formality" to remand the matter to the trial judge as the finder of fact, since "the result would be foreordained." *Id.* The court so held even though it ruled inadmissible or "unbelievable" (App. 10) three of the six types of evidence tendered by Sears upon which the district court relied in making its decision. (App. 22-24).

## REASONS FOR GRANTING THE WRIT

### I. The Seventh Circuit's Ruling Further Extends Circuit Court Conflict And Confusion Regarding The Treatment Of ERISA Claims Made Pursuant To The Terms Of An ERISA Plan When The Plan And SPD Conflict

The circuit courts have repeatedly addressed the issue of whether the plan document or an SPD controls when the two are in conflict. But, like the childhood game of "telephone," each iteration of the issue has only increased the doctrinal confusion. In the last two years, the confusion has compounded. Now is the time for this Court to intervene and provide certainty to plan participants and administrators on this important issue.

### A. The circuit courts do not agree under what circumstances the plan or the SPD will control in the event their terms conflict

Some circuits hold that the only time an SPD controls over the terms of the ERISA plan is when the SPD's provisions are more favorable to the participants, and the participants (a) are attempting to recover under the more beneficial terms of the SPD; and (b) relied on those SPD terms. *Govoni v. Bricklayers, Masons & Plasterers*, 732 F.2d 250, 252 (1st Cir. 1984) (Breyer, J.); *McKnight v. Southern Life And Health Insurance Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985); *Gridley v. Cleveland Pneumatic Co.*, 924 F.2d 1310, 1319 (3rd Cir.), *cert. denied*, 501 U.S. 1232 (1991).

The Sixth Circuit disagrees, and elevates the SPD over the plan whenever it favors the participant, regardless of any showing of reliance on the SPD. *Edwards v. State Farm Mutual Insurance Co.*, 851 F.2d 134, 136 (6th Cir. 1988). The Second Circuit holds that the SPD controls if it favors the participant, and has "express[ed] no view" as to whether a showing of reliance is necessary. *Heidgerd v. Olin Corp.*, 906 F.2d 903, 909 (2d Cir. 1990).

Some circuit courts even allow the SPD to control when it favors the employer, rather than the participant. Contrary to the ruling in this case, however, those courts caution that the plan controls if the SPD contains a statement (as does the SPD here, *see, e.g.*, App. 29-30) that the plan controls in the event of a conflict. *Sturges v. Hy-Vee Employee Benefit Plan and Trust*, 991 F.2d 479, 480 (8th Cir. 1993); *Glocker v. W.R. Grace & Co.*, 974 F.2d 540, 542-3 (4th Cir. 1992); *McGee v. Equicor-Equitable HCA Corp.*, 953 F.2d 1192, 1201 (10th Cir. 1992).

Recent decisions have done nothing to resolve the conflicts and confusion among the circuits. The Fourth Circuit holds that the plan controls, absent a showing of reliance by or prejudice to the participants. *Martin v. Blue Cross/Blue Shield of Va., Inc.*, 115 F.3d 1201, 1204 (4th Cir.), *cert. denied*, ___ U.S. ___, 118 S.Ct. 629 (1997) ("even if the participant never received the Plan, it will nonetheless control unless Mrs. Martin can show conflict between the Plan and the SPD and that she relied on or was prejudiced by the SPD."). The Tenth Circuit requires an enhanced showing of "some significant reliance" on the SPD. *Chiles v. Ceridian*, 95 F.3d 1505, 1519 (10th Cir. 1996). Before *Mathews*, the Seventh Circuit was in accord. *Hightshue v. AIG Life Ins. Co.*, 135 F.3d 1144, 1149 (7th Cir. 1998) ("significant reliance" required). The Eighth Circuit differs, holding that the SPD controls in the event of a conflict with the plan; the only time a participant must show reliance on or prejudice from the SPD is if the SPD is "faulty." *Marolt v. Alliant Techsystems, Inc.*, 146 F.3d 617, 621 (8th Cir. 1998). For its part, the Fifth Circuit holds that the SPD controls in the event of a conflict, but, like the Second Circuit, has reserved decision on whether the participant must show reliance. *Schadler v. Anthem Life Ins. Co.*, 147 F.3d 388, 392, fn. 4 (5th Cir. 1998); *Fallo v. Piccadilly Cafeterias, Inc.*, 141 F.3d 580, 583-4 (5th Cir. 1998). None of these cases, however, allow the employer to look to the SPD when the plan is more favorable to the participant.

### B. The Seventh Circuit's opinion in *Mathews* adds to the confusion, and conflicts with the opinions of other circuit courts

In *Mathews*, the Seventh Circuit found that "[t]he language of the Sears Plan . . . is unambiguous in favor of the class." (App. 7). The court then looked to the SPD to determine whether the Plan meant something other than what it said. The court did so despite the fact that the SPD on which Sears relied specifically provides that the Plan, and not the SPD, controls in the event of an inconsistency. (App. 29-30).

That the Seventh Circuit used the "extrinsic ambiguity doctrine" as a means to look to the SPD compounds the conflict and confusion, for two reasons. First, no court has ever before employed the extrinsic ambiguity doctrine to construe an ERISA plan contrary to its plain meaning and to the detriment of the plan participants. Second, the Sixth Circuit has rejected the notion that "federal courts [may] apply common law theories to alter the express terms of written benefit plans." *Health Cost Controls v. Isbell*, 139 F.3d 1070, 1072 (6th Cir. 1997); *cf.*, *Cinelli v. Security Pacific Corp.*, 61 F.3d 1437, 1444 (9th Cir. 1995) ("We recognize that ERISA generally preempts the common law theories of contract law").

Further, the Seventh Circuit held that Mr. Mathews could not recover under the terms of the Plan because he failed to demonstrate reliance on those terms. To hold otherwise, wrote the court, would give Mr. Mathews a "windfall." Aside from the fact that this holding adds fuel to the inter-circuit conflict over the reliance issue, it also directly and irreconcilably conflicts with the Tenth

Circuit's holding in *Pratt v. Petroleum Product Management Employee Savings Plan*, 920 F.2d 651, 662 (10th Cir. 1990).

In *Pratt*, the plaintiff sought recovery for breach of contract when his ERISA "top hat" pension plan refused to value his benefits in accordance with the terms of the plan. [ERISA affords less protection to "top hat" plan participants than the Plan here at issue. *Spacek v. Maritime Association*, 134 F.3d 283, 296 (5th Cir. 1998).] In finding for the plaintiff, the Tenth Circuit refused to require an ERISA participant to demonstrate reliance on the plan language in order to recover thereunder:

> In this case, we do not have a plaintiff relying upon a secondary plan document, a descriptive brochure. Rather, plaintiff merely is insisting that the terms of the original plan document be enforced. We will not require detrimental reliance before enforcing actual, express contractual provisions that admit only of a single interpretation.

*Pratt*, 920 F.2d at 662.

The Tenth Circuit likewise addressed and rejected a "windfall" argument akin to that raised by the Seventh Circuit in *Mathews*. The Tenth Circuit opined that Pratt must be paid in accordance with the terms of the plan even if "he would have received a windfall," and even if there was a "theoretically negative effect on other plan members." *Id.* Unlike the Seventh Circuit, the Tenth Circuit recognized that retirees are not fungible – the fact that Sears may have "overpaid" some of Mr. Mathews' co-workers by using the January 1 rate confers no benefit to Mr. Mathews as he attempts to live out his days on his lump sum distribution.

Finally, the Seventh Circuit completely ignored the caveat in the SPD (*e.g.*, App. 29-30) that if the Plan and the SPD conflict, the Plan controls. By so doing, the Seventh Circuit is in direct conflict with the Eighth Circuit's opinion in *Sturges*, the Tenth Circuit's opinion in *McGee*, and the Fourth Circuit's opinion in *Glocker*. Further, the Seventh Circuit's holding makes no sense, since it ill-serves the purposes of ERISA to allow *employers* – who are obligated to write the plan and then provide its summary to participants – to follow a "summary" that incorrectly summarizes the plan. 29 U.S.C. § 1102 (App. 31); *Curtis-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 83 (1995) (ERISA's writing requirement exists so that " 'every employee may, *on examining the plan documents*, determine exactly what his rights and obligations are under the plan' ") (cite omitted; emphasis in original); 29 U.S.C. § 1022 (SPD is intended to advise participants of "their rights and obligations *under the plan*"). (App. 31; emphasis added).

## II. The Seventh Circuit's Holding That An ERISA Plaintiff Is Never Entitled To A Jury Trial Conflicts With This Court's Seventh Amendment Rulings

Although this Court has never directly addressed the issue of whether an ERISA plaintiff seeking the unconditional and immediate payment of money damages is entitled to a jury trial under the Seventh Amendment, this Court has provided a clear framework for determining the answer to that question. Specifically, this Court has held that a two-part inquiry is required: "[t]o determine whether a particular action will resolve legal [as opposed to equitable] rights, we examine both the nature of the

issues involved and the remedy sought." *Teamsters Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990); *Tull v. United States*, 481 U.S. 412, 417-18 (1987); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). This Court has further held that the second part – "the remedy sought" – "is the more important." *Teamsters v. Terry*, 494 U.S. at 565. If, as here, both the nature of the issue and the remedy sought are "legal" (or if, as in *Teamsters v. Terry*, just the remedy sought is legal) then there is a constitutional right to a jury trial. *Id.*, 494 U.S. at 573-74; U.S. Const. am. VII.

The Seventh Circuit, however, eschewed such an inquiry in *Mathews*, holding instead that in ERISA cases "there is no right to a jury trial" regardless of the remedy sought (App. 8), "the reason being that ERISA's antecedents are equitable." (App. 13). Unless the Seventh Circuit's erroneous legal conclusion is corrected, other circuits may follow its incorrect approach to the jury trial issue in ERISA cases, leading to further erosion of this Court's decisions. As the Court has repeatedly noted: "any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Teamsters v. Terry*, 494 U.S. at 565 (cites omitted).

### A. The Tenth Circuit has described the nature of the issue here as a breach of contract

Under this Court's two-part Seventh Amendment inquiry, the first step is to determine the nature of the issue. " 'First, we compare the statutory action to 18th-century actions brought in the courts of law and equity.' " *Teamsters v. Terry*, 494 U.S. at 565, *quoting Tull*, 481 U.S. at 417-18. The Tenth Circuit did such a comparison in *Adams*

*v. Cyprus Amax Minerals Company*, 149 F.3d 1156 (10th Cir. 1998). The court determined, in accord with other circuits addressing the issue, that questions of eligibility to ERISA benefits are equitable in nature. *Adams*, 149 F.3d at 1161. However, in doing so, the court distinguished its earlier decision in *Pratt*, *supra*:

> the Pratt case involved the application of an unambiguous valuation procedure provided in the plan. An action by recognized beneficiaries to enforce unambiguous terms of a plan is more readily characterized as a breach of contract action than the more general eligibility claim raised here.

*Adams*, 149 F.3d at 1160 (cite omitted).

Thus, even though ERISA eligibility claims (like that in *Adams*) have been characterized as equitable, ERISA claims for breach of the unambiguous valuation procedures set forth in an ERISA plan (as here and in *Pratt*) are in the nature of an action at law for breach of contract. *See Vaughn v. Owen Steel Co., Inc.*, 871 F.Supp. 247, 250-51 (D.S.C. 1994) (breach of contract action brought under ERISA must be tried to a jury; notes that the Supreme Court has "recast some ERISA claims as legal without expressly so holding"). Indeed, this characterization comports with the practice of many circuit courts to analogize a section 1132 action to one for breach of contract, and to borrow the statute of limitations from "state contract law to establish limitations periods for civil enforcement actions brought under 29 U.S.C. § 1132." *Blue Cross & Blue Shield of Alabama v. Sanders*, 138 F.3d 1347, 1357 fn. 9 (11th Cir. 1998) (collecting cases).

Accordingly, the result of the first inquiry militates in favor of Mr. Mathews' Seventh Amendment right to a jury trial. *Teamsters v. Terry*, 494 U.S. at 570 (breach of contract is "a legal issue").

### B. This Court has repeatedly held that claims for monetary relief are legal

The Seventh Circuit likewise ignored the second (and most important) part of this Court's analysis: whether the nature of the remedy is legal or equitable. Mr. Mathews sought *monetary relief* pursuant to 29 U.S.C. § 1132(a)(1)(B), and this Court has "recognized the 'general rule' that monetary relief is legal." *Feltner v. Columbia Pictures Television, Inc.*, ___ U.S. ___, 118 S.Ct. 1279, 1287 (1998); *Teamsters v. Terry*, 494 U.S. at 570. Although there are two exceptions to this general rule (*i.e.*, where the damages are (1) restitutionary or (2) intertwined with injunctive relief), neither of those exceptions applies – or was found by the Seventh Circuit to apply – here.

First, Mr. Mathews' demand that he be paid the money owed him under the ERISA Plan is not "restitutionary" in nature, "as in action[s] for disgorgement of improper profits." *Teamsters v. Terry*, 494 U.S. at 570, quoting *Tull*, 481 U.S. at 424. In *Tull*, the Court held: "Restitution is limited to 'restoring the status quo and ordering the return of that which rightfully belongs to the purchaser or tenant.' " *Id.*, quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946). Mr. Mathews does not seek the restoration of the status quo, nor is he asking for the return of monies (or things) that he previously had in his possession and that were taken from him; rather he

seeks the unconditional and immediate payment of money pursuant to a contract right. *See, Pratt*, 920 F.2d at 658.

Second, the monetary relief Mr. Mathews seeks is not "incidental to or intertwined with injunctive relief." *Teamsters v. Terry*, 494 U.S. at 571. Unlike the plaintiffs in *Adams*, "the resolution of [Mr. Mathews'] claims for monetary relief [do not turn] on a determination of [his] eligibility under the plan." *Adams*, 149 F.3d at 1662. Thus, even under trust law, Mr. Mathews' right to unconditional and immediate payment would be deemed legal rather than equitable. *Id.* ("a beneficiary's remedy against a trustee is exclusively equitable unless the trustee has an immediate and unconditional duty to pay the beneficiaries"), citing the *Restatement (Second) of Trusts* §§ 197-198 (1959); *see, e.g., Bower v. Bunker Hill Co.*, 114 F.R.D. 587, 598 fn. 6 (E.D. Wash. 1986).

In sum, unlike the many ERISA cases in which the right to a jury trial was denied, here there is no eligibility issue (and hence no equitable issue). Sears' only obligation was to properly calculate Mr. Mathews' lump sum distribution using the rate set forth in the Plan. Sears failed to do so, in breach of the pension agreement, and Mr. Mathews is entitled to monetary damages at law from the breach. Any issues of contract interpretation should therefore be tried before a jury. *Hulcher v. United Behavioral Systems, Inc.*, 919 F.Supp. 879, 882 (E.D. Va. 1995) (joining "the developing trend in cases brought under ERISA § 1132(a)(1)(B) to permit a trial by jury"; collecting cases); George Lee Flint, Jr., *ERISA: Jury Trial Mandated for Benefit Claims Actions*, 25 Loy. L.A.L.Rev. 361 (1992)

(advocating jury trials under contractual legal remedies theory).

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

PAUL E. SLATER
*Counsel of Record*
BRUCE S. SPERLING
ROBERT D. CHEIFETZ
SPERLING, SLATER & SPITZ, P.C.
55 West Monroe, Suite 3300
Chicago, Illinois 60603
(312) 641-3200
*Counsel for Petitioner*

September 1998

**APPENDIX**

**In the**
**United States Court of Appeals**
**for the Seventh Circuit**

---

No. 97-2938

EDWARD H. MATHEWS, individually and on behalf of all others similarly situated,

*Plaintiff-Appellant,*

*v.*

SEARS PENSION PLAN and SEARS, ROEBUCK & COMPANY,

*Defendants-Appellees.*

---

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 1988 – **Harry D. Leinenweber,** *Judge.*

---

ARGUED FEBRUARY 25, 1998 – DECIDED MAY 13, 1998

---

Before POSNER, *Chief Judge,* and HARLINGTON WOOD, JR., and DIANE P. WOOD, *Circuit Judges.*

POSNER, *Chief Judge.* This is a class action under ERISA against Sears Roebuck's pension plan. It is brought on behalf of those employees of Sears who upon retiring received (between 1987 and 1994) a lump sum payout in lieu of an annuity. The determination of the lump sum required discounting to present value the future payments that the retiree would have received had he elected

the annuity form of pension. Discounting requires the selection of a discount rate. The Pension Benefit Guaranty Corporation recomputes the applicable rate every month. Sears' unvarying practice during the period covered by the suit was to use the rate fixed by the PBGC for January 1 of the year of retirement, even though the plan itself provides that the applicable rate is the PBGC rate that would be used "as of the date of distribution," which the plan defines as the first day of the month following retirement.

The named plaintiff retired on May 15, 1991, so his date of distribution was June 1, 1991. The PBGC discount rate for June was 6.75 percent. Sears, however, as usual used the January 1 rate, which was 7.25 percent, and as a result gave the plaintiff a smaller lump sum (by $17,324) than if it had used the rate applicable to the date of distribution. The reason it was smaller is that the higher the rate used to discount future payments to present value, the lower that present value will be. A discount rate is the interest rate at which a present lump sum would grow to equal specified future payments. That growth will be more rapid, and hence the starting point (the lump sum) smaller, the higher the rate. For example, the present value of an annuity of $10,000 a year for 20 years is $124,622 at 5 percent, but at 10 percent it is only $85,136.

The district court certified a class consisting of all the Sears retirees who in the period embraced by the complaint would have gotten larger lump sums had the PBGC discount rate applicable to their date of distribution been used instead of the January 1 rate. But the court

then granted summary judgment for Sears on the ground that use of the January rate did not violate the plan.

There is no suggestion that by its choice of the January 1 PBGC rate rather than the rate on the date of distribution Sears was trying to rip off anyone. On the contrary, over the period covered by the complaint interest rates generally were rising and as a result tended to be lower at the beginning of a year than at the end. So the use of the January 1 rate gave most retirees who elected a lump sum a larger amount than if Sears had followed the literal language of the plan – for remember that the lower the interest rate, the higher the present value of a stream of future entitlements.

The origin of the plan's language that is in issue ("as of the date of distribution"), and of the practice discrepant with that language, are remote from anything to do with the plan sponsor's wanting to reduce the retirement benefits paid out under the plan. In 1984 Congress required pension plans covered by ERISA to use interest rates published by the PBGC in calculating lump sum payouts. (The law has since been changed – the statute now requires the use of the interest rate on 30-year Treasury bonds, 26 U.S.C. § 417(e)(3)(A)(ii)(II) – but the change does not affect this suit.) Specifically it required the plans to use the PBGC rate "as of the date of the distribution [i.e., payout]." 26 U.S.C. § 417(e)(3)(B). The following year, however, the Treasury Department issued a temporary regulation which stated that a plan could use either the date of distribution or the first day of the plan year in which the employee retired. Treas. Reg. § 1.417(e)-1T(e)(i). (In its final form, the regulation added that "the plan must provide which date is applicable." We consider

the significance of this addition at the end of our opinion.) Although this may seem a bold, or even an outrageous, interpretation of the phrase "as of the date of the distribution," the validity of the regulation is not questioned.

At the time the temporary regulation was promulgated, Sears' pension plan provided that the January 1 rate would be used to calculate lump sum payouts. But because Sears (its people testified) wasn't certain that it wanted to continue using that date, it amended the plan, effective January 1, 1987, by replacing the January 1 rate with the language of section 417(e)(3)(B), thus creating the foundation for this lawsuit. Sears continued, however, without interruption or exception, to use the January 1 PBGC rate in calculating the lump sum payouts. And this method was clearly described in the summary plan documents furnished to all employees throughout the period. As far as appears, moreover, no one who retired during this period complained about the use of the January 1 rate.

At the end of 1994, Sears unilaterally amended the plan to reinsert January 1 in the place of the quotation from the statute. This action was possible because the plan allows Sears to amend the plan unilaterally, without consulting or getting the consent of any of the potential beneficiaries. And that is why the period covered by the suit ends on the last day of 1994. After that date, as until January 1, 1987 – the beginning of the complaint period – there was no possible argument that the plan required the use of a date different from January 1 of the year of retirement.

The parties agree that the ordinary principles of contract interpretation govern the interpretation of pension plans covered by ERISA. Cases can easily be cited for this proposition. See, e.g., *Lynn v. CSX Transportation, Inc.*, 84 F.3d 970, 973 (7th Cir. 1996); *Krawczyk v. Harnischfeger Corp.*, 41 F.3d 276, 279 (7th Cir. 1994); *Burnham v. Guardian Life Ins. Co.*, 873 F.2d 486, 489 (1st Cir. 1989). But like so many legal generalizations, this one requires qualification to be completely accurate. First, when the fiduciary aspects of a plan are in issue, the relevant principles are those of the law of trusts rather than the law of contracts. See, e.g., *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). Second, the relevant principles of contract interpretation are not those of any particular state's contract law, but rather are a body of federal common law tailored to the policies of ERISA. *Santaella v. Metropolitan Life Ins. Co.*, 123 F.3d 456, 461 (7th Cir. 1997); *Swaback v. American Information Technologies Corp.*, 103 F.3d 535, 540 (7th Cir. 1996); *Wegner v. Standard Ins. Co.*, 129 F.3d 814, 818 (5th Cir. 1997); *Denzler v. Questech, Inc.*, 80 F.3d 97, 101 (4th Cir. 1996). And third, when a case involves ERISA pension plans rather than ERISA welfare plans, the interpretive principles are also to be tailored to the distinctive characteristics of pension plans. See *Miller v. Taylor Insulation Co.*, 39 F.3d 755, 759 (7th Cir. 1994); *Black v. TIC Investment Corp.*, 900 F.2d 112, 115 (7th Cir. 1990); *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1299-1300 (6th Cir. 1991).

The third qualification is particularly important here. It is illustrated by the rule forbidding oral modifications of ERISA pension plans, *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1295-97 (5th Cir. 1989), and cases cited there;

see 29 U.S.C. § 1102(a)(1); cf. *Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 875-76 (7th Cir. 1997); *Miller v. Taylor Insulation Co., supra*, 39 F.3d at 759, a rule that is designed to protect the plan's solvency and that is not a part of the common law of contracts. E.g., *Mohr v. Metro East Mfg. Co.*, 711 F.2d 69, 72 (7th Cir. 1983); *Xerox Financial Services Life Ins. Co. v. High Plains Limited Partnership*, 44 F.3d 1033, 1041 (1st Cir. 1995); 2 E. Allan Farnsworth, *Farnsworth on Contracts* § 7.6, p. 228 (1990).

A further illustration comes from the fact that pension plans are usually not negotiated. Although this is true of many other contracts as well (printed form contracts, sometimes called "contracts of adhesion," are as numerous as the grains of sand on a beach), the reservation in Sears' plan, a common reservation in such plans, of the right *unilaterally* to amend the plan underscores the degree to which this particular kind of contract goes beyond even "take it or leave it." The potential beneficiary, though not consulted or consenting, ordinarily is bound nevertheless by the amendment unless it violates a provision of ERISA, as by cutting down on his accrued rights under the plan (basically the value of his own monetary contributions). See 29 U.S.C. § 1054(g); see generally 1 Ronald J. Cooke, *ERISA Practice and Procedure* § 4:43, pp. 4-168 to 4-169 (2d ed. 1996).

Our third illustration of the need to tailor the federal common law of contracts to the special characteristics of ERISA plans is the principle that the plan summary generally controls in the case of a conflict with the plan itself because the summary is what the plan beneficiaries actually read. See, e.g., *Fuller v. CBT Corp.*, 905 F.2d 1055, 1060 (7th Cir. 1990); *Chiles v. Ceridian Corp.*, 95 F.3d 1505,

1518-19 (10th Cir. 1996); *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 952 (8th Cir. 1994); *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 981-83 (5th Cir. 1991); *Edwards v. State Farm Mutual Automobile Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988). In the case of an ordinary contract, the full text would presumably trump a summary, and reliance on the summary would thus be thought unreasonable, though we cannot find a case directly on point. Cf. *Abraham Zion Corp. v. Lebow*, 761 F.2d 93, 103-04 (2d Cir. 1985); *United Virginia Bank/National v. Best*, 286 S.E.2d 221 (Va. 1982); *Green River Valley Foundation, Inc. v. Foster*, 473 P.2d 844, 847 (Wash. 1970); 2 Farnsworth, *supra*, § 7.10a, p. 260.

In short, while the starting point in resolving an issue of interpretation of an ERISA pension plan is the general law of contracts, the ending point may be different if the general law doesn't fit the issue because of something either in ERISA or in the nature of a pension plan. See *Buckley Dement, Inc. v. Travelers Plan Administrators of Illinois, Inc.*, 39 F.3d 784, 789 (7th Cir. 1994); cf. *Free v. Briody*, 732 F.2d 1331, 1337-38 (7th Cir. 1984).

The language of the Sears plan as it read during the period covered by the complaint is unambiguous in favor of the class, and ordinarily that would be the end of the analysis of a contract case. If a written contract is clear, that is, if reading it one doesn't sense any ambiguity, gap, or contradiction that makes one doubt one's ability to understand the contract merely by reading it, the court normally won't look further for evidence of meaning. This is the venerable "four corners" rule. Its purpose is to protect contracting parties from the uncertainty that would attend their obligations if a judge or jury were free to consider evidence that would contradict the terms of a

written contract. *In re Envirodyne Industries, Inc.*, 29 F.3d 301, 305 (7th Cir. 1994); *Continental Bank, N.A. v. Everett*, 964 F.2d 701, 705 (7th Cir. 1992); *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996). In such a regime all contracts would be revisable by judges and juries (in ERISA cases, just by judges, because there is no right to a jury trial in such a case, e.g., *Brown v. Retirement Committee of the Briggs & Stratton Retirement Plan*, 797 F.2d 521, 527 (7th Cir. 1986); *Sullivan v. LTV Aerospace & Defense Co.*, 82 F.3d 1251, 1257-59 (2d Cir. 1996); 2 Cooke, *supra*, § 8:15, pp. 8-84 to 8-85). The security that one seeks from having a written statement of one's legal rights and duties would be destroyed.

In limited circumstances, however, parties are allowed to present extrinsic evidence to demonstrate that although the contract looks clear, anyone who understood the context of its creation would understand that it doesn't mean what it seems to mean. This is the doctrine of extrinsic ambiguity. *Pierce v. Atchison, Topeka & Santa Fe Ry.*, 65 F.3d 562, 568 (7th Cir. 1995); *Home Ins. Co. v. Chicago & Northwestern Transportation Co.*, 56 F.3d 763, 767-69 (7th Cir. 1995); *Cole Taylor Bank v. Truck Ins. Exchange*, 51 F.3d 736, 737-38 (7th Cir. 1995); *AM Int'l, Inc. v. Graphic Management Associates, Inc.*, 44 F.3d 572, 577 (7th Cir. 1995). Properly limited, the doctrine fits single-employer ERISA pension plans, as has been held or assumed in cases in this and other circuits. *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 565 (7th Cir. 1995); *Bolton v. Construction Laborers' Pension Trust*, 56 F.3d 1055, 1059 n. 2 (9th Cir. 1995); *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1352 (8th Cir. 1980); cf. *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 608 (7th Cir. 1993) (en

banc) (plurality opinion); *id.* at 613 (concurring opinion). The qualifications "properly limited" and "single employer" must be emphasized. In *Central States, Southeast & Southwest Areas Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148 (7th Cir. 1989) (en banc), we refused to allow an employer by a secret side agreement to limit the contributions that he was required to make to a multiemployer plan under the terms of the plan. For by limiting his contributions he would be burdening the other employer participants in the plan and maybe even jeopardizing the plan's solvency. See also *Dugan v. Smerwick Sewerage Co.*, No. 96-3618, 1998 WL 177958 (7th Cir. April 16, 1998); *Black v. TIC Investment Corp., supra*, 900 F.2d at 115. Our analysis was based on the provisions and policies of ERISA relating to multiemployer plans. The present case does not involve a multiemployer plan, and anyway the doctrine of extrinsic ambiguity is invoked here to limit rather than expand the plan's obligations.

The general limitations of the doctrine are at least as important in cases involving ERISA pension trusts as in cases involving normal contracts. The most fundamental of these limitations is that to be admissible to establish an ambiguity, extrinsic evidence must be objective; that is, it must not depend on the credibility of testimony (oral or written) of an interested party – either a party to the litigation or (a natural extension, though one we cannot find a case discussing) an agent or employee of the party. *Unelko Corp. v. Prestone Products Corp.*, 116 F.3d 237, 241 (7th Cir. 1997); *Pierce v. Atchison, Topeka & Santa Fe Ry., supra*, 65 F.3d at 568; *Home Ins. Co. v. Chicago & Northwestern Transportation Co., supra*, 56 F.3d at 768-69; *Cole Taylor Bank v. Truck Ins. Exchange, supra*, 51 F.3d at 737;

*AM Int'l, Inc. v. Graphic Management Associates, Inc., supra,* 44 F.3d at 575-76. This limitation, without which it would be far too easy for a party to a contract to rewrite it in his favor after the fact, was violated in the two cases that the plaintiff cites to us, *Central States, Southeast & Southwest Areas Pension Fund v. Central Cartage Co.*, 69 F.3d 1312 (7th Cir. 1995), and *Central States, Southeast & Southwest Areas Pension Fund v. Joe McClelland, Inc.*, 23 F.3d 1256 (7th Cir. 1994), in which extrinsic evidence – in both cases oral and self-serving – offered to create an ambiguity in an ERISA pension plan was not allowed. Moreover, these cases involved multiemployer plans, like *Gerber*. See also *Dugan v. Smerwick Sewerage Co., supra.*

The limitation to objective evidence requires us to ignore three items of evidence tendered by Sears: testimony that the plan language was changed from January 1 to "date of distribution" because Sears hadn't made up its mind which date to use; testimony that the motivation for its deciding to stick with the January 1 rate was the cost of adapting Sears' data processing programs to enable Sears to change the interest rate used in its lump sum calculations monthly; and testimony that Sears understood the reference to "date of distribution" in the plan to mean January 1. An interested party may not by his oral testimony create an ambiguity in contractual language that seems clear. We add that the testimony that Sears could not have altered its programs to cope with a varying date is unbelievable, and at argument Sears' lawyer conceded that the plan could have hired out the relevant clerical tasks, albeit at some cost (of course).

But several other items of evidence were admissible to create an ambiguity because they do not require the

trier of fact to credit oral testimony by an interested party. The first consists of the identity of language between the statute and the plan, together with the Treasury regulation that defines the statutory term "as of the date of the distribution" to mean (at the election of the pension plan) either on the actual date of distribution (that is, the date of payment of the lump sum to the retiring worker) or on January 1 of the plan year in which the distribution occurs. This convergence of statutory and regulatory language with plan language suggests that "date of distribution" as used in the plan is a term of art, that is, a term that has a technical legal meaning different from its ordinary meaning – a technical legal meaning that in this case encompasses the use of the January 1 rate. The statute and regulation are here being used as a kind of specialized dictionary to establish an objective meaning different from that in ordinary language. *In re Envirodyne Industries, Inc., supra,* 29 F.3d at 305.

Reinforcing this inference are the facts, also perfectly objective, that the summary plan documents consistently refer to the January 1 rate, that use of that rate was Sears' uniform practice, and that nobody complained during the period in which the critical language was in the plan. These items of evidence suggest that everyone concerned understood that the relevant date was January 1 even though the plan said "date of distribution." The second and third items constitute "course of dealing" evidence, conventionally admissible to show that a seemingly clear contractual provision is actually ambiguous, because the credibility of such evidence is not a function of the self-serving testimony of a party to the contract. *In re New Valley Corp.,* 89 F.3d 143, 149-50 (3d Cir. 1996); *Smart v.*

*Gillette Co. Long-Term Disability Plan*, 70 F.3d 173, 179 (1st Cir. 1995); *Restatement (Second) of Contracts* § 212 comment b, § 223 comment b (1981); 2 *Farnsworth on Contracts, supra*, § 7.12a, pp. 279-80. As for the plan summary, it is written, unambiguous, a presumptively reliable guide to the contents of the plan itself, *Fuller v. CBT Corp., supra*, 905 F.2d at 1060; cf. *Butler v. Encyclopedia Brittanica, Inc.*, 41 F.3d 285, 290-92 (7th Cir. 1994) – indeed a guide that would be given controlling weight if the shoe were on the other foot and the plaintiff were trying to use the summary as a more generous measure of his benefits than the plan and could show that he had reasonably relied on language in the summary that was inconsistent with the language of the plan. E.g., *Fuller v. CBT Corp., supra*, 905 F.2d at 1060.

In the usual suit on a written contract, there is no trial, because the only evidence is the contract itself. When as in this case there is extrinsic evidence of contractual meaning as well, but that evidence is not disputed *in itself* although the inferences to be drawn from it are, the only issue for trial is the ultimate issue of what the contract means. The extrinsic evidence here consists of the Treasury regulation, the course of dealing, and the contents of the plan summary. None of these pieces of evidence is disputable; the only question is whether when weighed with the language of the plan they show that the plan bears the meaning that Sears claims it bears. In a jury case, that would be a question for the jury, *LaSalle National Trust, N.A. v. ECM Motor Co.*, 76 F.3d 140, 145 (7th Cir. 1996); *In re Stoecker*, 5 F.3d 1022, 1030 (7th Cir. 1993); *Coplay Cement Co. v. Willis & Paul Group*, 983 F.2d 1435, 1438 (7th Cir. 1993); *Thomas v. Bakery, Confectionery*

*& Tobacco Workers Union No. 433*, 826 F.2d 755, 764 (8th Cir. 1987), for with immaterial exceptions the jury is the finder of ultimate facts (or, as they are sometimes called, "mixed questions of fact and law"), such as negligence, as well as of primary facts, such as how fast the defendant's car was going. E.g., *Mucha v. King*, 792 F.2d 602, 605 (7th Cir. 1986); *Middleton v. Reynolds Metals Co.*, 963 F.2d 881, 884 (6th Cir. 1992); *United States v. Rule Industries, Inc.*, 878 F.2d 535, 542 (1st Cir. 1989).

But because, as we said, there is no right to a jury trial in an ERISA case (the reason being that ERISA's antecedents are equitable, compare *Feltner v. Columbia Pictures Television, Inc.*, 118 S. Ct. 1279 (1998)), and here no evidence besides that introduced at the summary judgment stage that the parties would be presenting at a trial, all the evidence bearing on the issue of contractual meaning was before the trier of fact at that stage. In these unusual circumstances, to remand the case for trial would be an empty formality; the result would be foreordained. 10A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure* § 2720, p. 26 (2d ed. 1983). *Brotherhood Shipping Co. v. St. Paul Fire & Marine Ins. Co.*, 985 F.2d 323, 326-27 (7th Cir. 1993), is not to the contrary. That case stands for the sound proposition that the mere fact that a case is not a jury case doesn't entitle the judge to try the case on summary judgment. Anglo-American law disfavors trial by affidavit. But here the exact same evidence was before the district judge at the summary judgment stage, and in the exact same form, that it would be if we remanded for trial. We don't see how he could reach a different conclusion.

The plaintiff has another string to his bow, however. He argues – in a departure from the normal case, in which the plan beneficiary relies on the summary plan documents, which he read, rather than the plan itself, which beneficiaries rarely read – that Sears' workers should be entitled to rely on the language of the plan. He points out that it would be unrealistic to suppose that any member of the class was actually aware of the Treasury regulation that impressed on seemingly clear language an almost opposite meaning. And this is true. But he does not claim that he or any other member of the class actually relied on the language of the plan. Such a claim would be hard to take seriously. Workers rely on the summary plan documents, not on the bulky and legalistic plan itself.

We thus have the unusual case in which a contract says X but means Y; one party does not know *why* it means Y – is not privy to the evidence (or to all the evidence) that establishes the real meaning – but is *told* (here in the summary plan documents) that it is Y, and is content because the difference between X and Y is immaterial at the time that he becomes a party to the contract, since he doesn't know when exactly he's going to retire or what the annual pattern of PBGC discount rates will be in the year of his retirement. We find nothing in the principles of contract law or the policies of ERISA or the peculiarities of pension plans to bar the application of the doctrine of extrinsic ambiguity, properly limited as we have said, to show that Sears' interpretation is correct. We cannot see how ERISA beneficiaries or anyone else within the protective sweep of the statute would be benefited by the adoption of principles of contractual interpretation so

rigid and archaic as to permit the class to reap the pure windfall here sought to the potential prejudice of other beneficiaries. It is a windfall not only because the members of the plaintiff class did not rely on the interpretation on which the suit is based, but also because there is no way that Sears can recoup the millions of dollars ($52 million to be precise) in extra benefits that it paid to other plan beneficiaries because of the interpretation that the class is challenging.

One loose end remains to be tied up. The Treasury regulation required Sears to indicate in the plan itself that it was going to use the January 1 rate, and Sears failed to do this. But this is not a suit to enforce the regulation; and in fact the Internal Revenue Service has not penalized Sears for its oversight. If the violation of the regulation were somehow a breach of contract, it would be a purely technical breach, entitling the victims only to nominal damages, since it did no harm. (Remember that the violation was just failing to amend the plan; the failure caused no harm to anyone, because no one relied on the language that Sears in violation of the regulation failed to change.) But we do not think it was any kind of breach. There is no suggestion that by failing to amend the plan – which remember that Sears could do without consulting or getting the consent of any of the potential beneficiaries – which eventually it *did* do without fuss – Sears was trying to deceive or otherwise take advantage of anyone. Although there was evidence that Sears was trying to preserve flexibility, which has overtones of opportunism summarized in the phrase "studied ambiguity," *North Bank v. Cincinnati Ins. Cos.*, 125 F.3d 983, 986-87 (6th Cir.

1997) – of Sears trying to preserve a right to jump whichever way minimized plan benefits – the fact is that Sears adhered steadily to the January 1 rate and as a result lost millions of dollars over the course of the period covered by the complaint.

AFFIRMED.

A true Copy:
Teste:

/s/ _____
*Clerk of the United States*
*Court of Appeals for*
*the Seventh Circuit*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| EDWARD H. MATHEWS, Plaintiff, | ) | No. 95 C 1988 |
| v. | ) | Judge Harry D. Leinenweber |
| SEARS PENSION PLAN and SEARS, ROEBUCK and CO., | ) | Magistrate Judge Keys |
| Defendant. | ) | |

## MEMORANDUM OPINION AND ORDER

(Filed July 7, 1997)

On July 3, 1996, the court granted Edward H. Mathews' motion that he be appointed to represent a class of Sears' retirees defined as:

> All participants in the Sears Pension Plan who received a lump sum payout from January 1, 1987, through December 31, 1994, and whose payouts were calculated by using the Pension Benefit Guaranty Corporation ("PBGC") interest rate in effect on the first day of the Plan year, and for whom that rate was higher than the PBGC rate in effect on their respective dates of distribution.

He seeks on behalf of the class the difference between what the sum would have been had the lower rate been used. The present value of a future stream of income, such as is provided by an annuity, is greater at a lower interest rate and vice versa: the present value is lower if a higher interest rate is use [sic].

The facts are not seriously in dispute. Mathews was employed by Sears from August 20, 1954 until May 15, 1991, when the unit in which he was employed was closed. He was a participant in the Sears Pension Plan that was subject to ERISA. The plan provided that the participant could elect to receive his benefits either through a series of monthly payments or by accepting a payment of a single lump sum. Under the applicable statutes, rules and regulations the interest rate to be used was to be no higher than that announced by the Pension Benefit Guaranty Corporation, a government agency. The agency was directed to adjust the rate monthly to reflect changes in financial and annuity markets. The interest rates are published in the *Federal Register* on the 15th day of the month preceding the effective date of the new rate.

The Sears Plan specifies in § 7.8 as follows:

> In calculating the lump sum actuarial equivalent of any amount to be paid in a lump sum pursuant to 7.4, the interest rate to be employed will be:
>
> (ii) The interest rate . . . which would be used (as of the date of distribution) by the Pension Benefit Guaranty Corporation for the purposes of determining present value of a lump sum distribution on plan termination.

Mathews received his lump sum distribution on June 24, 1991. The PBGC published interest rate in effect on June 1, 1991, was 6.75%. However Sears did not use this rate in calculating his lump sum distribution; it instead used the PBGC rate that was in effect on January 1, 1991, which was 7.25%. As a result, Mathews' lump sum distribution was $403,445.68 rather than the $420,770.64 it would have

been had it been calculated at the lower interest rate. This was not an isolated example; Sears estimates that if the class is successful its liability would be in the neighborhood of $31 million. Over the years Sears has always used the PBGC rate in effect on the first of each year, a practice that ironically benefited more people than it hurt. Sears calculates that during the class period it paid out approximately $52 million more than it would have paid had the monthly rate been used.

Mathews' argument is straightforward: the plan unambiguously calls for use of the PBGC rate in effect on the date of the distribution which has to be the rate in effect at the start of the month of distribution. ERISA requires employee benefit plans to be in writing and its express terms control so as to insure that employees receive the benefits promised to them in writing. *Schoonmaker v. Employee Savings Plan*, 987 F.2d 410, 413 (7th Cir. 1993) Therefore, Sears had no choice but to use the monthly rate according to the clear plan language.

Sears, on the other hand, while conceding that Mathews' interpretation of the interest provision is reasonable, contends that the plan provision concerning interest rate is "extrinsically ambiguous." Since the plans [sic] is ambiguous, Sears, the plan administrator, was entitled to interpret it in a reasonable manner, as the Plan expressly authorized. Its decision to use the January 1 interest rate was not arbitrary and capricious.

An extrinsic ambiguity is present when, "although the agreement itself is a perfectly lucid and apparently a complete specimen of English prose, anyone familiar with the real-world context of the agreement would wonder

what it meant with reference to the particular question that has arisen." *Federal Deposit Ins. Corp. v. W.R. Grace & Co.*, 877 F.2d 614, 620 (7th Cir. 1989). Parol and other extrinsic evidence is admissible to demonstrate that the contract is, in fact, ambiguous or means something other than it appears to mean. *Id.* This doctrine is part of the federal common law, *see AM Intern. v. Graphic Managment, Inc.*, 44 F.3d 572, 576 (7th Cir. 1995), and a variation of the doctrine of latent ambiguity has been applied in the ERISA context. *Miller v. Taylor Insulation Co.*, 39 F.3d 755, 760 (7th Cir. 1994).

In order to maintain the protection of the written words of contracts and to protect the parties from the vagaries of judges and juries, *i.e.*, to make it tougher to prove an extrinsic ambiguity, the law makes a distinction between what is referred to as "objective" and "subjective" evidence of ambiguity. *AM Intern.* at 575. "Objective" means evidence of ambiguity that can be supplied by a disinterested third party as opposed to "subjective" self-serving testimony and other evidence supplied by the parties themselves. It is a question of law whether an extrinsic ambiguity exists and its resolution is a question of fact. *Id.* With these principles in mind, the court will turn to the evidence the parties have submitted in support of their cross-motions for summary judgment.

In 1985, Sears adopted the language of § 7.8, effective, January 1, 1986, when it amended its plan to offer lump sum pension payments to many more Plan participants than had previously been eligible. It has from the very beginning, *i.e.*, from January 1, 1986, used the PBGC rate that was in effect on January 1 of the year of the distribution. It has never used the rate in effect for the

month in which the actual distribution is made. Sears contends that this was done out of necessity: due to the large number of pension payments it was required to make and the computer equipment that it then had, it was administratively impossible to use a monthly rate. Sears has annually advised its employees in the summary descriptions of the plan that it intended to use the PBGC January 1 rate for distributions during that year.

G. William Porter, an attorney with McDermott, Will, & Emery, Sears' attorneys for pension matters, and drafter of Section 7.8, testified by affidavit that he intended to give Sears "maximum flexibility" in selecting an interest rate for lump sum distributions. He therefore parroted the language of Section 417(e) of the Retirement Equity Act of 1984, which for the first time required the use of the PBGC rates for calculating lump sum pension benefits. Specifically, Section 417(e) of the Act provided that for purposes of calculating the present value of benefits a plan was required to use "an interest rate not greater than the interest rate which would be used (as of the date of distribution) by the [PBGC] for purposes of determining the present value of lump sum distributions on plan termination" – language virtually identical to that chosen by Parker for Section 7.8. The Sears Board of Directors adopted the amendment on November 9, 1985, to be effective January 1, 1986.

The previous July 19, 1985, a temporary Treasury regulation had been issued as a guide to interpret the new Section 417(e). It stated that a "plan must use an interest rate not greater than the rate used by the [PBGC] to value immediate annuities for plans terminating as of either (A) the proposed distribution . . . date or (B) the

first day of the plan year that contains the proposed distribution . . . date (the "PBGC rate")." Temp. Treas. Reg. § 1.417(e)-IT(b)(2)(ii) (1985). Thus Porter had the benefit of the Treasury's interpretation of § 417(e).

Section 417(e) was itself amended by the Tax Reform Act of 1985. This statute used the term "applicable interest rate" for the first time but it was defined the same as before: "the interest rate which would be used (as of the date of distribution) by the [PBGC] for purposes of determining the present value of lump sum distribution on plan termination." Final Treasury regulations stated that either date could be used but that the "plan must provide which date is applicable." Treas. Reg. § 1.417(e)-1(d)(3).

On November 8, 1994, Sears adopted an amendment to its Plan, retroactive to January 1, 1985, specifically adopting as the applicable interest rate the PBGC rate "as of the first day of the Plan Year in which the participant's benefit commencement date. . . . " [sic] This amendment along with several others was approved by the Internal Revenue Service as complying with the relevant provisions of the Internal Revenue Code, qualifying the Plan for favorable tax treatment.[1]

Sears has produced affidavits from two of its employees in addition to Porter. Sears presents affidavits from Linda Zaccardi, Operations Manager for the Pension Plan, and Jane Tanquary, Plan Administrator. They state

---

[1] The applicability of this amendment to the case would appear to be foreclosed by the "anti-cutback" rules. *See* ERISA § 204(g); 29 U.S.C. § 1054g; 26 C.F.R. § 1.417(e)-1(d)(3)(iv); *see also, Constantine v. TRW*, 13 F.3d 969, 982 (6th Cir. 1994).

that Sears has consistently used the January 1 interest rate and identified it in the plan summaries which were annually given out to the employees. (Objective Fact). They also testified that due to computer limitations Sears was unable to use the monthly rate. Plaintiff does not dispute this in his 12(N) statement. Porter's testimony, on the other hand, is almost entirely subjective and consists of what he intended and why he drafted the plan language in the way he did.

But Sears also produced affidavits from a variety of individuals who are (apparently) unaffiliated with it. (Objective Evidence). Theodore Rhodes, an attorney in private practice, and former attorney-advisor to the Department of Treasury Office of Tax Legislative Counsel, gave as his opinion that § 7.8 was ambiguous because the plan parroted the statute and the Treasury regulations interpreting the statute allowed either the January 1 rate or the monthly rate as alternative interest rates even though the statute appears to require the rate applicable during the month of distribution. Harry J. Conaway, an attorney and former lead Treasury Department attorney on the Retirement Equity Act of 1984 and Tax Reform Act of 1986, testified that the objective of the 1984 law was to protect employees from having their employers use an unrealistically high interest rate in computing lump sum distributions. He was a Treasury advisor to the Senate Committee that wrote the bill and it was its intent to allow either interest rate to be used. In discussions on drafting of proposed regulations, there was a disagreement among the Treasury Department employees whether either rate could be used or only the one in effect on the date of distribution. The Department decided that

the statutory provision was ambiguous and the Department could exercise its authority to issue regulations to authorize the use of either rate. Ira Cohen, a former IRS employee and current principal with Price Waterhouse LLP specializing in pension matters, likewise opined that the § 7.8 and the 1984 statute were ambiguous for essentially the same reasons.

Arrayed against this evidence Mathews argues that the language of both the statute and § 7.8 are unamiguous, hence any Treasury regulation contravening the statute would not be valid and courts need not defer to it. Mathews also disagrees with Sears' interpretation of the Treasury Regulations and argues that the regulations themselves make it clear that, while the employer may select either date, it must designate which one it selects in the plan itself. The Sears Plan expressly adopts the interest rate in effect on distribution. He also submits certain documents from the PBGC to that effect.

It is clear to the court that Sears has produced some objective evidence that there was an ambiguity in the statute and therefore there was the same ambiguity in the Sears Plan. The language could well have been purposely adopted by Sears to create an ambiguity in its own plan to give it flexibility and a safe harbor. Sears, in fact, did lobby the Treasury Department to permit semi-annual changes in the PBGC rate.

The evidence produced by Sears is of the type described by the 7th Circuit that can be relied upon by the court in deciding whether or not an extrinsic ambiguity exists. If the term of the agreement appears "odd" in the real world, such oddness could be evidence of

extrinsic ambiguity. *Grace* at 621. The affidavit of an officer of a non-party was considered to be objective evidence in *Cole-Taylor Bank v. Truck Insurance Exchange*, 51 F.3d 736, 740 (7th Cir. 1995). And evidence of a relevant custom and usage was suggested in *AM Intern.* at 577.

Accordingly, the court finds that the evidence does demonstrate that there was an extrinsic ambiguity in the contract. Having been given discretion to construe the terms of the plan, it was up to Sears, as the plan administrator, to interpret the interest provision reasonably. Sears could consider extrinsic evidence in doing so. *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 332 (7th Cir. 1987). Just as in the case of a patent ambiguity, Sears' interpretation of plan terms that contain a latent ambiguity, will only be rejected by the court if arbitrary and capricious. *See Bolton v. Construction Laborers' Pension Tr. for Southern Calif.*, 56 F.3d 1055, 1058 (9th Cir. 1995) (describing previous decision to remand case as "a determination that the Plan contained a latent ambiguity as to whether the break-in-service rule applied to involuntary breaks, and that the Pension Appeals Committee acted arbitrarily and capriciously in interpreting the rule.")

In the present case, Sears interpreted the provision as requiring application of the interest rate as of the beginning of the year of the lump sum distribution. This interpretation was not arbitrary. The language of the interest provision parroted that of Section 417(e), which had been interpreted to allow for use of either the rate applicable in the month of distribution or that applicable at the beginning of the year of distribution. Furthermore, the drafter of the plan testified that this language was used in anticipation of using the annual PBGC interest rate, while

leaving the door open for use of a semi-annual rate once approved by the Treasury. Given the apparent difficulty administratively for Sears to use the monthly rate, the "unanticipated costs" associated with such an interpretation made use of the annual rate even more reasonable. *See Krawczyk v. Harnischfeger Corp.*, 41 F.3d 276, 279 (7th Cir. 1994). Furthermore, Sears has consistently applied the annual rate to *every* lump sum payment it has made, making its decisions to use the annual rate less and less "arbitrary" as time progressed. *Id.* In addition, it is unlikely that plaintiffs could convincingly claim that they were surprised by Sears' interpretation where it had been disclosed in the summary descriptions of the plan during the relevant years. For all of the above reasons, the decision by Sears to use the annual PBGC rate was not arbitrary and capricious and will, accordingly, not be second-guessed by the court.

In conclusion, Mathews' motion for summary judgment is denied. Defendant Sears' motion for summary judgment is granted. Judgment entered in favor of Sears.

**IT IS SO ORDERED.**

/s/ Harry D. Leinenweber
Harry D. Leinenweber, Judge
United States District Court

Dated: July 7, 1997

**United States Court of Appeals**

**For the Seventh Circuit**

**Chicago, Illinois 60604**

**June 26, 1998**

**Before**

**Hon. Richard A. Posner, Chief Judge**
**Hon. Harlington Wood, Jr., Circuit Judge**
**Hon. Diane P. Wood, Circuit Judge**

| | | |
|---|---|---|
| EDWARD H. MATHEWS, individually and on behalf of all others similarly situated, | ) | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. |
| Plaintiff-Appellant, | ) | No. 95 C 1988 |
| No. 97-2938 v. | ) | Harry D. Leinenweber, *Judge.* |
| SEARS PENSION PLAN and SEARS, ROEBUCK & COMPANY, | ) | |
| Defendants-Appellees. | ) | |

## ORDER

On May 27, 1998, plaintiff-appellant filed a petition for rehearing with suggestion for rehearing *en banc* and on June 12, 1998, defendants-appellees filed a [sic] answer. All the judges on the original panel have voted to deny the petition, and none of the active judges* has requested a vote on the suggestion for rehearing *en banc*. The petition is therefore DENIED.

---

* Hon. Joel M. Flaum did not participate in the consideration of the petition.

App. 28

# Sears

# Pension Plan

**CHECKLIST**

*A SUMMARY PLAN DESCRIPTION*

A00551

**introduction**

The Sears Pension Plan covers all eligible Checklist and Timecard employes.

The purpose of this booklet is to enable you and your family to understand and evaluate the major provisions of the amended Sears Pension Plan. You should read the booklet carefully because it describes such important Plan elements as when you qualify for a pension, how that pension is determined, and what kind of survivor benefits are available for your spouse or other beneficiary.

In addition, it tells how the Pension Plan works together with your Savings and Profit Sharing Fund, Social Security benefits, and your own savings and investments to provide the unique four-part package which comprises your retirement program. For a fuller understanding of this program you should also read the Company's most recent booklet on the Savings and Profit Sharing Fund *(The Savings and Profit Sharing Fund of Sears Employes* [sic], *A Summary Plan Description)* and the government's most recent edition of its pamphlet on Social Security benefits.

The Profit Sharing booklet is available from your local Personnel Office and the Social Security pamphlet can be obtained by writing the Social Security Administration, P.O. Box 57, Baltimore, Maryland 21203.

All three booklets should be kept handy for future reference because someday your retirement program will be as important to you as your paycheck is now.

Although this booklet highlights the main provisions of the Pension Plan, it is not a legal document. Complete

details of the Plan can be found in the official Plan Document, which is the controlling instrument of the Plan in all cases. You may examine, or obtain a copy of, this Document in accordance with the procedures described on page 43.

**why a retirement program?**

For some Sears employes [sic], retirement may seem a long way off; for others, it may be only a few years away. Regardless of age, however, we all want to prepare as carefully as possible for a comfortable retirement. No one wants to worry about financial security during the leisure years. Yet, it's often difficult for the individual to provide this security entirely on his or her own.

All too often, retirement conjures up an image of financial belt-tightening instead of financial security. However, as a Sears employe [sic], you can look forward to a guaranteed income in your retirement years, thanks to the comprehensive retirement program that Sears has developed for you.

A00554

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

**U.S. Const. amend. VII.**

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

**29 U.S.C. § 1102. Establishment of plan**

(a) Named Fiduciaries

(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

**29 U.S.C. § 1022. Summary plan description**

(a) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification

in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

**29 U.S.C. § 1132. Civil enforcement**

(a) Persons empowered to bring a civil action

A civil action may be brought –

(1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

---